THE CITY OF CRYSTAL LAKE, An Illinois Municipal Corporation,

Petitioner,

vs.

NATIONAL YEAST CORPORATION, formerly known as Grade Yeast Corporation, a New Jersey Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL YEAST CORPORATION IN OPPOSITION.

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 587.

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OPINIONS BELOW.

The District Court did not render any opinion in this case.

An early order of the District Court, denying the Yeast Corporation's motion for a preliminary injunction (R. 30-31), was reversed by the Court of Appeals for the Sev-

enth Circuit, and the District Court was directed "to proceed in accordance with the views here expressed" (147 F. (2d) 711; Pet. 29-36).

Subsequently, after full hearing before a Master in Chancery (R. 73-249), the District Court entered an Order on January 9, 1948, providing, in part, "That the Preliminary Injunction entered in this cause on April 13, 1945 (R. 39-40), be, and the same hereby is, made permanent until November 10, 1949 * * *" (R. 261). This Order was affirmed by the Court of Appeals for the Seventh Circuit, which rendered an opinion that has not yet been reported (R. 296-302; Pet. 37-44).

JURISDICTION OF THIS COURT.

The judgment of the Court of Appeals was entered on November 8, 1948 (R. 303). The City's Petition for Re-Hearing was denied, without an opinion, on December 7, 1948 (R. 305). The Petition for a Writ of Certiorari was filed by the City in this Court on February 23, 1949, being more than ninety days after the entry of judgment by the Court of Appeals, but within ninety days after denial of the Petition for Re-Hearing (see Title 28, United States Code, section 2101). The City seeks to invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code (now Title 28, United States Code, section 1254).

QUESTIONS PRESENTED.

The principal question presented is whether the United States District Court had jurisdictiton of this proceeding on the ground of diversity of citizenship. Subordinate questions are:

(a) Whether, under all of the pertinent facts, the Yeast Corporation was entitled to an extension of its contract for use of the City's storm sewers to November 10, 1949.

(b) Whether the contract in question was *ultra vires* the powers of the City.

(c) Whether the contract in question was based upon good and valuable considerations.

STATEMENT.

The National Yeast Corporation manufactures baker's yeast at its main plant in Belleville, New Jersey (R. 74), and, since 1939, at another plant in Crystal Lake, Illinois. Many pertinent facts are found in negotiations before November 10, 1939, when the contract here in question was executed.

The Yeast Corporation realized that the establishing of its branch business in a new community involved more than merely acquiring title to real estate and installing equipment. There was the possibility of restrictions or prohibitions by zoning ordinances. Quite vital, also, was adequate provision for satisfactory disposal of the waste from its manufacturing process and of large quantities of water used for cooling (R. 74-75). For those reasons, the con-

tract by which the Yeast Corporation ultimately acquired title to its property in Crystal Lake contained a clause for cancellation of the purchase contract "if it be found that there be any [zoning] ordinance of the township of Crystal Lake, or any other objection upon the part of the city authorities" (see R. 83, 88, 74, 284).

Thereafter, the Yeast Corporation conferred with the City of Crystal Lake on several occasions before consummating the purchase of the Crystal Lake plant site from the Bowman Dairy Company (R. 74, 90, 107). The fact that the manufacture of yeast produces unpleasant and obnoxious odors was brought to the attention of the City (R. 75, 107). The need of the Yeast Corporation for adequate sewerage facilities for the disposal of its waste and cooling waters was discussed in detail. The Yeast Corporation was told by the City that the Bowman Dairy Company had discharged its waste on a seven-acre tract a mile from the factory site (outside of the city limits of Crystal Lake) and was assured that, if respondent ever had any difficulty in disposing of its effluent and water in that manner, they could be discharged into the sanitary sewer and the City's new treatment plant then about to be build by the City (R. 75, 90, 228-229). The Yeast Company relied on those statements and consummated the purchase from Bowman of the Crystal Lake plant site and the right to use for waste purposes the seven-acre country tract (R. 75-76).

In these conferences, the City advised the Yeast Corporation that a large number of the citizens of Crystal Lake then were on the relief rolls and that the City was anxious to get them removed therefrom. Frequent inquiries were made by the City as to how many local persons would be employed by the Yeast Corporation and the amount of its average weekly payroll (R. 75, 90-91, 107-108). The interest and desire of the City to have the Yeast Corpora-

tion establish a plant in Crystal Lake were epitomized by one of its Aldermen when he said that the "stink" (from the Yeast Corporation's effluent) could not be bad enough to stop employment of at least thirty people, because that would take at least thirty families off relief (R. 107-108). The City then wanted and urgently needed for its citizens, the employment and wages that would be available for those citizens if the Yeast Corporation established a manufacturing plant there.

It is worthy of comment, too, that the contract here in question does not grant any special privileges which would prevent a like grant to others. It is not an exclusive license or privilege in any sense. Furthermore, the contract does not provide for any use of the storm sewer when it is needed by the City to carry off surface waters or for repair (Paragraph 3 of contract; R. 250). In other words, this contract permits the Yeast Corporation to use only the excess capacity of the storm sewer, that is, to use it only when, due to lack of precipitation, little, if any, of the capacity is used or needed by the City or its residents.

Subsequently, it developed that discharge of the Yeast Corporation's effluent into the sanitary sewer might create problems at the municipal sewage treatment plant (R. 84). The use of the storm sewer, as provided in the contract ultimately executed, instead of the sanitary sewer as originally contemplated, was a solution suggested by the Sanitary Water Board of the State of Illinois and the Yeast Corporation as a means of relieving the City from the problems that might have been created at its municipal sewage treatment plant by fulfillment of the representations made by the City to the Yeast Corporation (R. 91-92, 93, 100).

The City, pursuant to a resolution of its Council, signed a contract dated January 18, 1939, and submitted it to the Yeast Corporation for signature. Prior to that time, Al-

bert Sabath, attorney for the Yeast Corporation, had negotiations with the City in regard to the proposed contract. The first contract submitted to him was that dated January 18, 1939 (R. 13-16, 77). Thereafter, the Yeast Corporation found that it would be impossible to procure the bond required by Paragraph Seventh of that contract (R. 106). That contract was never executed by the Yeast Corporation (R. 116).

The third paragraph in said proposed contract also contained a provision that the City might close the shut-off valve at the Yeast Corporation's outlet sewer line upon giving fifteen minutes' notice (R. 250-251); such provision had been inserted in order to protect the City against overloading its storm sewer during any heavy rainstorm. Sabath objected to these provisions and also asked that the permissible discharge be increased from 350 gallons to 500 gallons per minute. Subsequently, the City agreed to such modifications and requested Sabath to redraft the contract to incorporate those changes (R. 106). Pursuant to that request, Paragraphs First to Tenth of the contract were rewritten by Sabath; the contract of November 10, 1939, embodied the gist of the original contract (R. 13-16) with the said changes (R. 249-253). Sabath then submitted such contract, with those modifications, to the City (R. 106).

Prior to the return of the new Agreement to Sabath, the last sentence of paragraph Tenth and all of Paragraph Eleventh had been added. He promptly conferred with Mayor Peterson and Mr. Cowlin, attorney for the City. Sabath told them that he could not recommend that the Yeast Corporation execute the contract, because it could not afford to invest a "couple hundred thousand dollars" in the City of Crystal Lake and have only five years in which to take advantage of the storm sewer for emptying the residue from its operations. The Mayor stated that if the Yeast Corporation complied with the other condi-

tions of the contract and kept taking care of the odor, it could "live" in Crystal Lake as long as it wanted and the contract would be renewed again and again. Both the Mayor and Mr. Cowlin assured Sabath that, if the conditions stated in the first ten paragraphs were performed, such performance would constitute compliance and would be considered as satisfactory so far as the Mayor and the City were concerned. Sabath wrote to Mr. Goldman, Treasurer of the Yeast Corporation, about these conversations and about the assurances of Mayor Peterson and Cowlin. Sabath advised Goldman to execute the contract (R. 115-118). That contract, bearing the date of November 10, 1939, then was executed by the Yeast Corporation and is the contract upon which this suit is based (R. 249-253).

In its Brief, the Petitioner, by implication, magnifies the odors from the Yeast Company's effluent. It would have this Court believe that obnoxious odors from that source were present at all times. The Yeast Corporation produced many witnesses who, though admitting the existence of odor prior to construction of the new $48,000 odor-removing digesters, stated that it was not continuous (R. 99, 102, 109, 110, 111, 112, 113, 120, 142, 144, 151). Many of the witnesses for the City conceded the same fact (R. 157, 173, 176, 183, 186, 188, 189, 191, 197, 202, 207). None of them noticed any such odors since August 1946. The new digesters installed by the Yeast Corporation now completely eradicate the odors (R. 95, 103, 123, 124, 135, 151, 226).

The City's Brief also minimizes the steps taken by the Yeast Corporation to eliminate the odors and contends that its efforts were only intermittent instead of continuous. In November, 1938, for this purpose, the Yeast Corporation employed Dr. H. O. Halvorson, professor of Bacteriology in the Medical School of the University of Minnesota, who was a recognized authority on industrial waste (R. 91, 118). He has continued as its consultant on

industrial waste from that time to the present, making a number of trips to Crystal Lake each year (R. 120).

At the time when the November 10, 1939, Contract was made, the City knew that science had not yet perfected a means for entirely eliminating the odor from the Yeast Corporation's effluent. The City's attorney was present at a conference with the Sanitary Water Board of Illinois in October, 1939, when this fact was discussed (R. 91). A similar statement was made to the City on May 8, 1938, by Louis A. Smith, attorney for the Yeast Corporation (R. 108).

The Record is replete with the various detailed accounts of the experiments performed and recommendations made by Dr. Halvorson. The Yeast Corporation followed all of his recommendations, although it sometimes was delayed by inability to get materials (R. 120-121).

At first the waste was stored and treated in open lagoons on the seven-acre tract outside of Crystal Lake, formerly used by the Bowman Dairy Company (R. 75-76, 77, 85, 86, 91). The process there was known as anaerobic digestion, that is, treatment in the absence of air. The effluent also was subject to aerobic digestion, that is, in the presence of air, by being pumped through a trickling filter which sprayed it over a bed of rocks (R. 121). It was conceded in the Yeast Corporation's Complaint that "all of said efforts did not at all times remove the unpleasant odor from the waste coming from the manufacture of yeast" (R. 9).

In the course of his research, Dr. Halvorson discovered a so-called "closed system," a new and modern method of removing odor, consisting of two closed tanks, technically called anaerobic digesters. For some time, he was unwilling to recommend spending large sums of money for the new system because of lack of confidence that the new, untried process would work commercially (R. 121-122). The

proposed new digesters and the apparatus used in connection with them required a large quantity of steel and materials critical to the war effort (R. 79). The cost of the project also was in excess of that then permitted without special governmental authorization (R. 98).

The Complaint in this proceeding, seeking an injunction permitting the Yeast Corporation to continue to use the storm sewer, was filed in the Office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on November 3, 1944 (R. 2-13). Shortly thereafter, the Yeast Corporation's motion for a temporary injunction was denied by the District Court (R. 30-31). Upon appeal to the United States Court of Appeals, that decision was reversed and the cause was remanded to the District Court with directions to proceed in accordance with the views there expressed (Pet. 29-36).

While the case was pending on this first appeal, the Yeast Corporation made contracts for the construction of its new treatment plant (R. 87, 88), which was erected at a cost of $48,000.00 (R. 99) and placed in operation during the pendency of the suit. At the time of the completion of the new odor-removing digesters, there were no competent sanitary engineers available to supervise the operation of the plant, because most of them were in the military service or so employed that they could not undertake additional tasks (R. 80, 95, 123). M. W. Tatlock, a sanitary engineer, was employed by the Yeast Corporation on February 3, 1946, a few weeks after his discharge from military service, to supervise operation of the new treatment plant (R. 80, 95, 125). Mr. Louis Berman, a chemical engineer, was employed on February 20, 1946 (R. 147-148), following his release from the Army, and placed in charge of the actual operation of the new treatment plant (R. 123, 148). As rapidly as possible, all of the effluent was removed from the open lagoons, which have not been used since that time (R. 98). From early August,

1946, there has been no odor from waste produced by the Yeast Corporation's manufacture of yeast in Crystal Lake (R. 217-218, 221, 232-233, 236).

As stated in some detail in the Argument herein, plans for the new digesters had been prepared by the Yeast Corporation and submitted to the City as early as the fall of 1943 (R. 78, 94). If it had not been for the active opposition and passive resistance on the part of the City, the new odor-removing digesters could have, and would have, been completed and placed in full and satisfactory operation before November 10, 1944, when the contract with the City expired (R. 88, 89, 98-99, 132).

The case was referred to a Master in Chancery before whom hearings were held over a long period of time. These hearings ultimately resulted in a Report which was filed by him in the Clerk's office of the District Court on March 25, 1947, and contained a History of the Case, Findings of Fact, Conclusions of Law and a recommendation that a Decree be entered, granting a Writ of Injunction, enjoining the City from interfering in any manner whatsoever with discharge of the Yeast Corporation's cooling water and waste into the storm sewer of the City prior to November 10, 1949,[1] except in the manner and under the circumstances expressly provided in the contract (R. 239-253). Such Findings of Fact have substantial support in the evidence, as held by the courts below. Numerous objections to the Master's Report were filed by the City (R. 253-259) and ultimately overruled by the District Court. Thereupon, a Decree was entered on March 25, 1947, adopting the Findings of Fact and Conclusions of Law of the Master in Chancery and granting an injunction in accordance with the recommendations of the Master in Chancery.

1. In accordance with the renewal clause of the contract (paragraph eleventh, R. 252), this date amounts to a renewal of the contract for five years from its expiration.

The Decree also taxed various costs and made special provisions for credits on account thereof by virtue of payments during the course of the litigation (R. 260-263).

Upon Appeal by the City to the Court of Appeals for the Seventh Circuit, the Decree of the District Court was affirmed by an opinion filed and a judgment entered on November 8, 1948 (R. 296-303). Thereafter, the City filed a Petition for Rehearing which was denied by an Order entered on December 7, 1948 (R. 305). Even though not specifically discussed in the opinions of the Court of Appeals, all of the questions mentioned in the first paragraph of page 9 of the Petition were presented to the Court of Appeals on each appeal.

REASONS FOR DENYING THE WRIT.

1. There is no conflict with the decisions of this Court or of another Court of Appeals.

2. The decision does not involve an important or unsettled question of federal law.

3. The questions which the City seeks to raise consist largely of questions of fact which have been resolved against it by the Master in Chancery and concurring findings of the two lower Courts.

ARGUMENT.

1. The facts in this case are clear. With the exception of one paragraph, every provision of the contract here in question (R. 249-253) sets forth rights or obligations between *only* the Yeast Corporation and the City. The sole portion of that contract which relates, in any way, to the Crystal Lake Building Corporation, which petitioner contends is an indispensable party, is the following:

> "Seventh: The National Grain Yeast Corporation and the Crystal Lake Building Corporation, owner of said property, agree to and do hereby indemnify the City of Crystal Lake against any damages it may sustain by reason of any claims filed against the City of Crystal Lake by reason of the National Grain Yeast Corporation discharging its effluent into the storm sewer of the City of Crystal Lake, and the said National Grain Yeast Corporation and the Crystal Lake Building Corporation herewith agree for the life of this agreement not further to encumber its plant at the above-mentioned site." (R. 252.)

The provisions of Paragraph Seventh above do not give the Building Corporation any rights whatsoever,—no right to use the storm sewer, nor any right to renewal of the contract,—but impose two obligations on it.

The first of those obligations is the purely contingent liability to indemnify the City if it should sustain damages by reason of claims filed against it because of discharge of effluent by the Yeast Corporation into the storm sewer. So far as the Yeast Corporation knows, no claim ever has been filed against the City on that ground (R. 104). The record in this case is entirely devoid of any evidence (or even an allegation) that any such claim ever was filed against the City. No question is involved in this case so

far as the first clause of said Paragraph Seventh is concerned. There is no "collision of interests" (*Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181) between the City and the Building Corporation under that clause, although a collision of interests is required to defeat diversity jurisdiction here.

The other obligation imposed on the Building Corporation by said Paragraph Seventh is the agreement "not to further encumber its plant". Not only was said property not further encumbered after execution of that contract, but the encumbrance then existing was paid by the Yeast Corporation (R. 104).

The Building Corporation was a wholly owned subsidiary of the Yeast Corporation (R. 83) and had been incorporated at the time of the purchase of the property from the Bowman Dairy Company for the sole and exclusive purpose of taking title to the real estate. That was done for two reasons: (1) the Yeast Corporation then was not authorized to do business in Illinois and (2) because, in the opinion of the Yeast Corporation's attorney, it should have nothing to do with the property until it had been determined that "everything would run along smoothly." When that was determined, title was to be conveyed to the Yeast Corporation (R. 109). In furtherance of that program, the Building Corporation had divested itself of title to all of its property by conveyance to the Yeast Corporation prior to the inception of this case (R. 75, 105).

At the time when this suit was filed, the Yeast Corporation was the owner of (a) its factory within the City of Crystal Lake, (b) the right to use the seven-acre country tract formerly used by The Bowman Dairy Company and (c) other real estate used in connection with its treatment plant (R. 75, 105). It has never encumbered its plant in the City of Crystal Lake, but has paid in full the pre-

viously existing mortgage thereon. The manufacturing plant and also the treatment plant now are free and clear of all liens and encumbrances (R. 104).

Numerous decisions support jurisdiction of the District Court where, as here, the facts show that the Building Corporation was neither a necessary nor an indispensable party. Even the cases cited by the Petitioner, when analyzed in light of their facts, are in accord with jurisdiction of the District Court here. *Shields* v. *Barrow,* 17 How. 130, 139; *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 69; *State of Washington* v. *United States et al.,* 87 Fed. (2d) 421, 427 (C. C. A. 9, 1936).

Furthermore, even though the Building Corporation had been joined as party plaintiff, it would not have ousted the jurisdiction of the District Court under the facts in this case. As clearly shown above, it is not an indispensable party, but is one whose interest, if any, is entirely severable from the issue before the court, so that diversity jurisdiction would not be ousted. *Wormley* v. *Wormley,* 8 Wheat. 421, 451; *Wood* v. *Davis,* 18 How. 467, 469; *Walden* v. *Skinner,* 101 U. S. 577, 589; *Cameron* v. *McRoberts,* 3 Wheat. 591, 593-594; *Carneal* v. *Banks,* 10 Wheat. 181, 188-189; *Vattier* v. *Hinde,* 7 Pet. 252 at 262-263; *Boon's Heirs* v. *Chiles,* 8 Pet. 532, 535-536; *Salem Trust Co.* v. *Manufacturers' Finance Co.,* 264 U. S. 182, 189-190. As the court below concluded (Pet. 39), at the time of this suit, the Building Corporation was a "figurehead." The Court stated (Pet. 42):

> "A 'collision of interests' between the City and the Building Corporation can only arise if and when the City is required to defend a suit for damages growing out of the subject-matter of the contract, but there is no collision of interests in the relief sought in this proceeding."

The remainder of the City's argument on the question

of jurisdiction is specious. It is based upon a feigned concern over loss of the Crystal Lake Building Corporation as an indemnitor under the terms of Paragraph Seventh of the Contract of November 10, 1939. The value of the Crystal Lake Building Corporation as an indemnitor never was any greater than that of its assets which, at the time of the execution of that contract, included the yeast manufacturing plant in Crystal Lake, subject to a purchase-money mortgage. The City now is better indemnified by the renewed obligation of the Yeast Corporation, co-indemnitor under Paragraph Seventh of the contract, because all assets of the Crystal Lake Building Corporation, except a small amount of cash, are owned by the Yeast Corporation and are clear of all encumbrances and liens (R. 75, 104-105).

2. In the exercise of their discretion, municipal corporations are bound, no less than private citizens and other corporations, to standards of reasonableness interpreted in light of all surrounding circumstances. This is particularly true when, by passive resistance and active opposition, the City hindered and prevented the Yeast Corporation from constructing its new $48,000 waste treatment plant (R. 99) prior to November 10, 1944, when the contract with the City expired.

It is to be noted that Paragraph Eleventh of the contract upon which this suit is based provides for five-year extensions, "providing conditions are satisfactory[2] to both parties hereto, *at the expiration of this Agreement*" (R. 252) [Italics supplied]. The City adopted numerous Resolutions refusing to renew or extend the

2. In its 1945 opinion in this case, the Court of Appeals for the Seventh Circuit applied Illinois law in holding (Pet. 34) that "satisfactory" means satisfactory to the mind of a reasonable man. The Court relied upon *Erickson* v. *Ward*, 266 Ill. 259 (1914); *Keeler* v. *Clifford*, 165 Ill. 544 (1897); and III Williston on Contracts (1936 Revised Edition) Sec. 675a.

contract in question beyond November 10, 1944. Many of them were after the City was given plans, as early as December 7, 1943, showing details of the contemplated new odor-removing treatment plant, and after the City was advised as to the efficiency thereof (R. 181-182). These Resolutions apparently were in accordance with the unexplained plan or wishes of the City as expressed in the statement of its Mayor to the Yeast Corporation that whether the Yeast Corporation eliminated the odor or not, he would get it out of the storm sewer, if it was the last thing he did (R. 140). The various Resolutions of the City, denying or threatening denial of use of the storm sewer by the Yeast Corporation, made its problems in connection with the new treatment plant very difficult and greatly impeded it in obtaining the necessary governmental permits and authorizations and delayed the ultimate construction and completion of the new $48,000 digesters. If it had not been for opposition by the City, the Yeast Corporation could have, and would have, constructed the present odor-removing digesters and had them in operation before November 10, 1944, when the contract expired (R. 89, 98-99). As the Master and District Court found (R. 244, 261), the Yeast Corporation acted diligently and in good faith in seeking to eliminate odors from the effluent from its manufacture of yeast (R. 76-79, 86, 87, 89, 91-94, 98, 103, 119, 120-123, 131-132, 135).

The matter of opposition and lack of cooperation on the part of the City is largely a question of fact, which already has been determined adversely to the City by the findings of the Master in Chancery, which were adopted by the District Court (R. 261) and quoted with approval by the Court of Appeals (Pet. 42-44). *Inter alia*, the Master in Chancery found (Pet. 43):

> "That the failure and refusal of the Defendant to cooperate with the Plaintiff in its efforts to obtain

> priority permits, hindered and prevented the Plaintiff from obtaining materials and authorization necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast."

Under such facts, the City cannot be permitted to determine by itself that conditions were unsatisfactory "at the expiration of this Agreement" (Paragraph Eleventh, R. 252), when the continuance of those conditions to that date was largely the fault of the City. As the Court of Appeals stated, "This refusal [by the City] to cooperate was arbitrary and bordered on bad faith" (Pet. 35).

The operation of the new treatment plant since its completion has demonstrated conclusively that the new process has eliminated all unpleasant odor from the effluent arising from the manufacture of yeast in Crystal Lake, which would have been the condition on November 10, 1944, had it not been for the opposition of the City[3] (R. 243).

3. At each stage of this litigation, the City has attempted, unsuccessfully, to insist that the contract here in question was the exercise of a legislative function of a municipal corporation and, therefore, not binding upon the City beyond the terms of the Mayor and City Council, which authorized its execution. Apparently, this erroneous argument is based upon the fact that the Statutes of the State of Illinois give the corporate officers of municipalities certain powers in regard to the construction, maintenance and use of storm sewers. The mere fact that a power is granted by the enactment of a legislature does not change the nature of the power and make its exercise automatically a legislative function. Granting a private

3. The Record fully illustrates the positive action and passive resistance by the City, which hindered and prevented the Yeast Corporation from obtaining materials and authorizations necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast. See R. 78, 79, 88-89, 94-95, 98-99, 140, 181, 182; see also Pet. 35, 38, 43.

corporation a non-exclusive right (as in this case) to use a storm sewer is the exercise by a municipality of the same business or proprietary function as exercised in agreements authorizing use of the public streets for the construction and maintenance of water mains and telephone or electric lines. All of these are within the powers of municipal corporations within the State of Illinois, without regard to the relation between the period covered by the contract and the terms of office of the officials who authorized its execution. *City of Rock Island* v. *Central Union Telephone Co.,* 132 Ill. App. 248, 263-264 (1907); *Wagner* v. *City of Rock Island,* 146 Ill. 139, 154 (1893); *City of Chicago* v. *Ames,* 365 Ill. 531, 533 (1937).[4]

4. Disregarding the terms of the contract which sets out the mutual covenants of the parties as the consideration therefor (R. 249-253), the Petitioner appears to contend that the only consideration which can support the contract between the parties hereto is the payment of money by the Yeast Corporation to the City. To understand the actual considerations, a further statement of facts is necessary.

In the contract between the respondent and the Bowman Dairy Company, the former agreed to buy the property in Crystal Lake, ultimately conveyed to it by Bowman, subject to the following conditions (see R. 83, 88, 74, 284):

> "It is expressly understood and agreed that the property to be conveyed is to be used for the purpose of the manufacture of bakers' yeast and it is agreed, on behalf of Bowman Dairy Company, that if it be found that there be any ordinance of the township of Crystal Lake, or any other objection upon the part of the city authorities, then the earnest money

4. In view of these decisions, the decision in *Trustees of the Illinois Central Hospital for the Insane* v. *City of Jacksonville,* 61 Ill. App. 199, 202 (1895), cited by the petitioner (Pet. 25), is not a correct statement of the law in Illinois.

herewith deposited shall be returned to the depositor and the agreement for purchase shall be null and void."

Thereafter, the Yeast Corporation conferred with the City on several occasions before consummating the purchase of the property (R. 74, 90, 107). The fact that the manufacture of yeast produces unpleasant and obnoxious odors was brought to the attention of the City (R. 75, 107).[5] The need of the Yeast Corporation for adequate sewerage facilities for the disposal of its waste and cooling waters was discussed in detail. The Yeast Corporation was told by the City that the Bowman Dairy Company had discharged its waste on the seven-acre tract a mile from the factory site (outside the city limits of Crystal Lake, and subsequently used by the respondent) and was assured that, if it ever had any difficulty in disposing of its effluent and water in that manner, they could be discharged into the new treatment plant then about to be built by the City (R. 75, 90, 228-229). The Yeast Corporation relied on those statements and consummated the purchase of the property (R. 75).

In these conferences, the City advised the Yeast Corporation that a large number of the citizens of Crystal Lake were then on the relief rolls and that the City was anxious to get them removed therefrom. Frequent inquiries were made by the City as to how many local

5. In light of the knowledge of the City prior to execution of the contract of November 10, 1939, the Master in Chancery was correct in his statement, adopted by the District Court (R. 261), that "Apparently the contract does not bind the plaintiff to an absolute elimination of said odors, but does put the burden upon the plaintiff to use its best efforts to eliminate them, entirely if possible." (R. 242.) The City knew, before executing the contract, that the manufacture of yeast results in an unpleasantly odorous effluent (R. 75, 107), and that there then was no known process for the treatment of waste from the manufacture of yeast (R. 108).

persons would be employed by the Yeast Corporation and the amount of its average weekly payroll (R. 75, 90-91, 107-108). The interest and desire of the City to have the Yeast Corporation establish a plant in Crystal Lake was epitomized by one of its Aldermen when he said that the "stink" (from the Yeast Corporation's effluent) could not be bad enough to stop employment of at least thirty people, because that would take at least thirty families off relief (R. 107-108). The City then wanted and urgently needed for its citizens, the employment and wages that would be available for them if the Yeast Corporation established a manufacturing plant there.

The City was told by the Yeast Corporation that about 100 people would be employed while the plant was being equipped and about 35 or 40 permanently, for whom the average weekly payroll would be $1200 to $1600. In addition, $50,000 to $60,000 would be spent annually for power, coal and incidental expenses (R. 75, 90-91, 107). These estimates have proven to be correct through the years (R. 76, 106).

Even though it desired to establish a manufacturing plant in Crystal Lake, the Yeast Corporation was under no duty to do so, and would not have done so if certain conditions, heretofore discussed, had not been fulfilled (R. 74-75, 83). In consummating the purchase of both the factory site there and the right to use the seven-acre tract in the country for waste, and in spending $200,000 for the acquisition and installation of specialized equipment, the respondent relied on the assurances of the City that it could use the sanitary sewers when the City's new treatment plant was completed (R. 75-76). The use of the storm sewer, as provided in the contract, instead of the sanitary sewers as originally contemplated, was a solution suggested by the Sanitary Water Board of Illinois and the Yeast Corporation, as a means of relieving the

City from the problems that would have been created at its municipal sewage treatment plant by the fulfillment of the representations made by the City to the Yeast Corporation (R. 84, 91-92, 93, 100). Rather than being lack of inducement, the Yeast Corporation's relinquishment of the anticipated (and more desirable) use of the sanitary sewer is additional consideration for the contract here in question.

The foregoing constitute good and valuable considerations for execution of the contract by the City. See I Williston on Contracts (1936 Revised Edition) pp. 319, 320-321, 323, 326-327, 384. In addition, by various covenants in the contract (R. 249-253), the Yeast Corporation bound itself to perform numerous obligations,[6] so that the Master was amply justified in finding that the contract "was based upon good and valuable consideration" (R. 244).

It should be noted that the District Court's injunction does not compel the City to allow the Yeast Company to continue, for an additional period of five years, "the discharge of its obnoxious and stinking waste into the City's storm sewer" as suggested by the petitioner (Pet. 10). Nothing in the decree of the District Court or in the opinion of the court below sanctions the discharge of "obnoxious and stinking waste" into the City's storm sewer. On the contrary, the Master in Chancery found (R. 245):

> "That the Plaintiff has eliminated all unpleasant odor from the effluent arising from its manufacture of yeast.
>
> • • • • •

6. There is substantial support in the evidence for the finding of the Master in Chancery (R. 245), adopted by the District Court (R. 261) and quoted by the Court of Appeals (Pet. 43), that the Yeast Corporation has carried out each term, provision, and condition of the contract here in question. (See R. 103-104, 88, 89, 98-99, 132.)

"That the manufacture of yeast by the Plaintiff and the disposal of the effluent therefrom is not now creating a public nuisance in the City of Crystal Lake."

These findings were adopted by the District Court (R. 261) and quoted with approval by the Court of Appeals (Pet. 43, 44) and completely disprove the petitioner's statement that this injunction compels the City to allow the Yeast Company to continue for an additional period of five years to discharge its "obnoxious and stinking waste" into the City's storm sewer.

Conclusion.

The decision of the Court of Appeals is clearly right and does not involve any question of great importance. There is no conflict of decisions. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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